

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.09.2018

CORAM:

THE HONOURABLE MR. JUSTICE K.KALYANASUNDARAM

W.P.No.175 of 2012

Mr.K.Isaiarasan

... Petitioner

Vs

1.The Special Officer,
I.I.552, Eraiyur Primary Agricultural
Co-operative Loan Society Ltd., Pennadam Post,
Thittakudi Taluk,
Cuddalore District.

2.The Joint Registrar of Co-Operative Societies,
No.3, Seashore Salai,
Cuddalore - 1.

.... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records of the second respondent in proceeding No.2808 of 2010 dated 21.12.2010 and quash the same and direct the Respondents to re-instate the petitioner in service on compassionate and humanitarian grounds following the guidelines of the Supreme Court in the rulings concerning Government servants interpreting the provisions of Article 311 of the Constitution of India.

For Petitioner : Mr.Ramesh Ganapathy
For M/s.Mission Legal

For Respondent : Mr.R.Parthiban for R1
Mr.L.P.Shanmuga Sundaram
Special Government Pleader
for R2

ORDER

Heard Mr.Ramesh Ganapathy, learned counsel for the petitioner, Mr.R.Parthiban, learned counsel for the first respondent and Mr.L.P.Shanmuga Sundaram, learned Special Government Pleader for respondent No.2 and perused the materials available on record.

2. This writ petition has been filed challenging the order of dismissal and for a direction to reinstate the petitioner in service.

3. The petitioner was appointed as a salesman in the Fair Price Shop attached with Eraiyur Primary Agricultural Co-operative Credit Society. When the petitioner was working in Arukeri Fair Price Shop, he was placed under suspension on 24.03.2007. Thereupon, a charge memo was issued alleging that the petitioner was unauthorizedly absent from 01.03.2007 and there was shortage of articles during stock verification, causing loss to the tune of Rs.41,400/-. After due opportunity, the Enquiry Officer found that the charges leveled against the petitioner were proved and the Disciplinary Authority accepting the finding of the Enquiry Officer, dismissed the petitioner from service on 21.01.2010. The order of the dismissal was confirmed by the second respondent on 21.12.2010. Challenging the order, the present writ petition has been filed.

4. The learned counsel for the petitioner would submit that though very many grounds have been raised to assail the order of termination, he would confine his argument with regard to non-payment of subsistence allowance. The learned counsel for the petitioner by placing reliance on the decisions of the Hon'ble Supreme Court reported in (1999) 3 SCC 679 [Capt.M.Paul Anthony vs. Bharat Gold Mines Ltd., & Anr], (2000) 7 SCC 90 [Jagadamba Prasad Shukla vs. State of U.P] and a decision of this Court in CDJ 2017 MHC 2609 [R.Sarathy Vs. The District Manager, Tamil Nadu State Marketing Corporation Limited, TASMAL, Thiruvannamalai & Others], would contend that non-payment of subsistence allowance would vitiate the entire proceedings and he is entitled for reinstatement.

5. Per contra, learned counsel for the first respondent, by citing the decisions reported in (2005) 8 SCC 211 and 2001 (1) L.L.N 957 would argue that unless non-payment of subsistence allowance causes prejudice and it was established before the enquiry proceedings, the non-payment of subsistence allowance alone cannot be a ground to set aside the order of dismissal and the relevant paras are extracted hereunder:-

(i) U.P.State Textile Corpn. Ltd. Vs. P.C. Chaturvedi [(2005) 8 SCC 211]

"12. So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken by Respondent 1 employee that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. He did not plead or substantiate also that the non-payment was either deliberate or to spite him. It

is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as an absolute position in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings."

(ii) M.Guruswamy v. Presiding Officer [2001 (1) L.L.N 957]

"6. In this paragraph their Lordships conclude:

"No material has been placed before us in this case to show that the appellant had sufficient means to defend himself before the Tribunal".

Relying on this learned counsel contended that the whole enquiry was vitiated on account of the non-payment of the suspension allowance. Our attention was invited firstly to the award where in Para. 4, at page 90 the Labour Court has observed as under:

"It is true that the petitioner was placed under suspension with effect from 25 September, 1980. Suspension pending enquiry is permissible under the bye-laws of the society and was justified in the circumstances of the case. Having regard to the circumstances of the case, the President of the society did not sanction subsistence allowance of the petitioner..."

These particular sentences form part of the counter-filed by the Management which were being quoted by the Labour Court. From this, it was pointed out that this situation was very much present before the Labour Court. Learned counsel also invited our attention to the affidavit in the writ petition wherein in ground "(i)" of page 107 the following ground was raised:

(i) I humbly submit that during the period of my suspension, i.e., between 25.9.1980 to 2 February, 1982. I was not even paid subsistence allowance as contemplated in the bye-laws of the second respondent-society. Further, I was not paid bonus for the period between 1 July, 1979 and 30 June, 1980 and from 1 July, 1980 till the date of my suspension, till 25 September, 1980. I also

submit that I was not paid salary for the month of September, 1980, the month I actually worked till the date of suspension on 25 September, 1980. Without prejudice to my contention in the writ petition, I pray that this Hon'ble Court may be pleased to direct the second respondent to pay me the salary and bonus for the period mentioned and other terminal benefits which I am entitled to during the pendency of the writ petition.

From these learned counsel suggested that it was an admitted position that the subsistence allowance was not paid and therefore the whole enquiry was vitiated.

7. In the first place, we do not find any complaint having been made in the above ground about the non-payment of subsistence allowance and inability on the part of the petitioner/appellant to take part in the enquiry. In fact the enquiry was attended by the worker. He took full part therein. The matters do not stop there. A preliminary issue was framed regarding the validity of the enquiry and it was held by the Labour Court by its order, dated 2 December, 1986, that the enquiry was valid. Apart from the fact that the order is not before us or was not present before the learned Single Judge also, no ground seems to have been made by the petitioner at any stage. We have again deliberately reproduced the contention raised in writ petition. There also there was no complaint made that the enquiry was vitiated in any manner. Again no contentions seem to have been raised before the learned Single Judge that the enquiry was vitiated on account of the non-payment of the subsistence allowance. The tenor of the aforementioned reported judgment of the Supreme Court is not mechanical, so as to hold that when there is non-payment of subsistence allowance, the enquiry itself is rendered bad. There have to be some other conditions also. We find that there has been no complaint made regarding the non-payment of the subsistence allowance at any point of time, particularly when that opportunity was available to the appellant/petitioner. Firstly on 2 December, 1986, when the enquiry was held to be valid on a preliminary issue framed for that purpose. If the point was not raised at any stage thereafter that is before the Labour Court, as also before the learned Single Judge, we do not think, we would be justified in allowing that point to be raised and for the first time find that the enquiry was hit by the breach of the

principles of natural justice and was not a valid enquiry. As it is we find that the petitioner had not made any grudge against that. We, therefore, agree with the learned Single Judge when he confirms the award of the Labour Court."

6. The learned counsel for the first respondent would also contend that once the charge of misappropriation has been proved, the employer has every right to terminate the service of the delinquent and the Court cannot show any sympathy, by citing the judgment of the Hon'ble Supreme Court in AIR 2000 SC 3129 [Janatha Bazar 9 South Kanara Central Cooperative Wholesale Stores Ltd. Etc. v. Secretary, Sahakari Nourakara Sangh etc.] and the Hon'ble Supreme Court has observed as follows:-

" 6. As stated above, the learned Single Judge and the Division Bench in writ appeals confirmed the findings given by the Labour Court that charges against the workmen for breach of trust and misappropriation of funds entrusted to them for the value mentioned in the charge-sheet had been established. After giving the said findings, in our view, the Labour Court materially erred in setting aside the order passed by the management removing the workmen from service and reinstating them with 25% back wages. Once an act of misappropriation is proved, maybe for a small or large amount, there is no question of showing uncalled-for sympathy and reinstating the employees in service. Law on this point is well settled. (Re: Municipal Committee, Bahadurgarh v. Krishnan Behari [(1996) 2 SCC 714 : 1996 SCC (L&S) 539 : (1996) 33 ATC 238] .) In U.P. SRTC v. Basudeo Chaudhary [(1997) 11 SCC 370 : 1998 SCC (L&S) 155] this Court set aside the judgment passed by the High Court in a case where a conductor serving with U.P. State Road Transport Corporation was removed from service on the ground that the alleged misconduct of the conductor was an attempt to cause loss of Rs 65 to the Corporation by issuing tickets to 23 passengers for a sum of Rs 2.35 but recovering @ Rs 5.35 per head and also by making entry in the waybill as having received the amount of Rs 2.35, which figure was subsequently altered to Rs 2.85. The Court held that it was not possible to say that the Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in Punjab Dairy Development Corpn. Ltd. v. Kala Singh [(1997) 6 SCC 159 : 1997 SCC (L&S) 1434] this Court considered the case of a workman who was working as a Dairy Helper-cum-Cleaner for collecting milk from various centres and was

charged for the misconduct that he inflated the quantum of milk supplies in the milk centres and also inflated the quality of fat contents where there were less fat contents. The Court held (at SCC pp. 161-62, para 4) that in view of the proof of misconduct a necessary consequence will be that the management had lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11-A of the ID Act to grant relief with minor penalty.."

7. The learned counsel for the first respondent by referring the counter would submit that the petitioner was unauthorizedly absented himself from duty since 01.03.2007 without permission or intimation to the second respondent. Hence, there was no other option except taking a disciplinary action against the petitioner. He would further add that one Mr.R.Natarajan, Sub-Registrar (Retired) was appointed as an Enquiry Officer and the notices sent through registered post dated 20.08.2008, 29.08.2008 have been returned as "unclaimed". Eventually, service was effected on the petitioner through the Village Administrative Officer, Eraiyur and only thereafter, the petitioner appeared before the Enquiry Officer and participated in the enquiry proceedings. It is also stated that in the second explanation, the petitioner has admitted the shortage of the stocks and paid Rs.34,450/- on 10.12.2008 and 07.02.2009 respectively. Accordingly to the learned counsel, the petitioner was very much residing in the village, but, deliberately evaded the service and he has not pleaded and established that non-payment of the subsistence allowance, caused prejudice.

8. A perusal of the records would reveal that no compliant has been made by the petitioner, the non-payment of subsistence allowance resulted in his inability to take part in the enquiry. Moreover, it is to be noted that initially an unsuccessful attempt was made to evade service, however, later, the petitioner participated in the enquiry. Hence, in my considered opinion that the judgments relied on by the learned counsel for the first respondent would squarely apply to the case on hand.

9. For the above stated reasons, I find no merit in the Writ Petition. The Writ Petition fails and the same is dismissed. There is no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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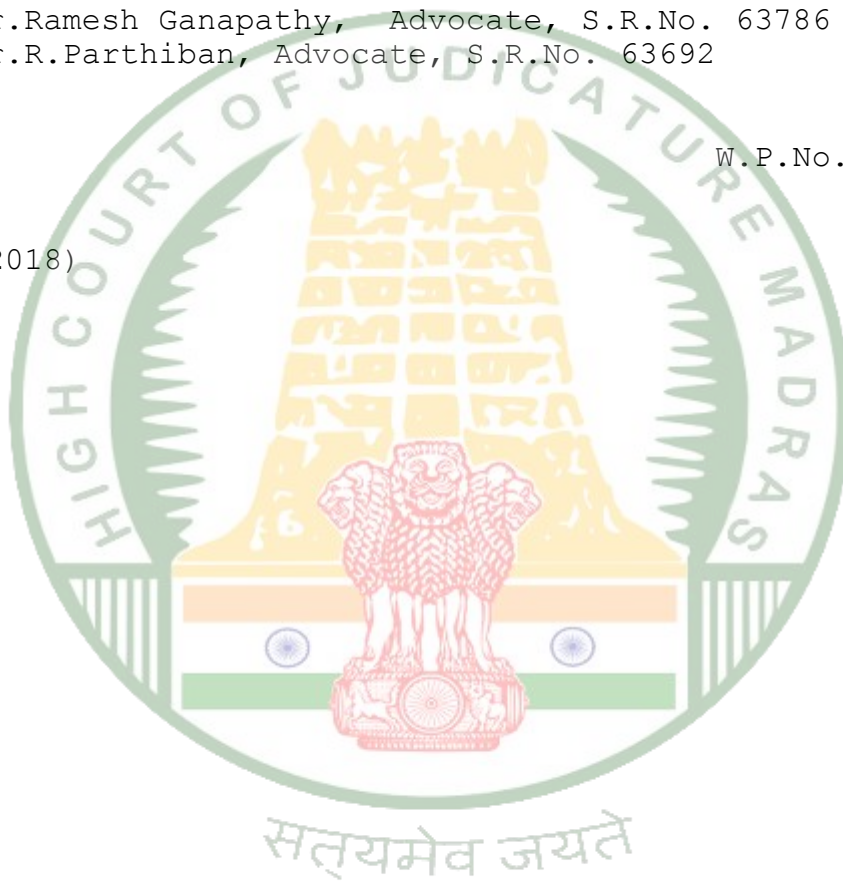
To

- 1.The Special Officer,
I.I.552, Eraiyur Primary Agricultural
Co-Operative Loan Society Ltd., Pennadam Post,
Thittakudi Taluk, Cuddalore District.
- 2.The Joint Registrar of Co-Operative Societies,
No.3, Seashore salai, Cuddalore - 1.

+1cc to Mr.Ramesh Ganapathy, Advocate, S.R.No. 63786
+1cc to Mr.R.Parthiban, Advocate, S.R.No. 63692

W.P.No.175 of 2012

CA (CO)
GN (25/10/2018)



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